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PUBLIC SERVICE
COMMISSION

October 20, 2004

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: Enforcement of Interconnection Agreement Between BellSouth
Telecommunications, Inc. and NuVox Communications, Inc.
PSC 2004-00295

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Reply in Support of Its Motion for Summary Disposition.

Sincerely,


Cheryl R. Winn

Enclosure

cc: Parties of Record

554314

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ENFORCEMENT OF INTERCONNECTION)	
AGREEMENT BETWEEN BELLSOUTH)	
TELECOMMUNICATIONS, INC.)	CASE NO. 2004-00295
AND NUVOX COMMUNICATIONS, INC.)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, respectfully submits its Reply in Support of its Motion for Summary Disposition. NuVox Communications, Inc.'s ("NuVox") opposition memorandum fails to raise any material fact or issue that would warrant an evidentiary hearing in this matter. The matter before this Commission is a simple contract interpretation issue. The terms of the Interconnection Agreement governing the audit that BellSouth seeks are clear and unambiguous. Accordingly, as a matter of law, BellSouth is entitled to audit NuVox's Kentucky enhanced extended links circuits ("EELs") and BellSouth's request for the Commission to order NuVox to submit to the audit should be granted.

INTRODUCTION

The audit provision at issue succinctly declares the parties' intent. No aspect of the parties' understanding with respect to BellSouth's right to audit previously provisioned EELs was omitted. There are no gaps to be filled, nor ambiguities to be resolved. Upon 30 days' notice, BellSouth is entitled to audit the circuits it provisioned in order to "verify the type of traffic being transmitted" over those circuits. Interconnection Agreement, Att. 2, § 10.5.4.

Interestingly, NuVox asserts that BellSouth has taken the audit clause "out of context." NuVox Opposition at 1. That is not the case. BellSouth's audit rights represent half the bargain

struck with respect to the provisioning of the circuits. The other half of the bargain -- the NuVox benefit -- required BellSouth to provision the circuits NuVox requested based entirely on NuVox's self-certification that they were to be used to provide a "significant amount of local exchange service" to particular customers. *Id.*, Att. 2, §§ 10.5.1, 10.5.2. Thus, "the context" for the audit rights BellSouth is seeking to enforce is this: BellSouth agreed to convert circuits from special access to UNEs with no questions asked, provided that BellSouth had the prospective ability through the audit provisions cited, to ensure proper use of the circuits.

Placed "in context," the conversion and audit terms are a plausible, reasonable commercial exchange. Based solely on its competitor's word, BellSouth must place special access revenues at 100% risk; however, BellSouth gets a post-conversion opportunity, upon notice, to audit records to verify the transactions' premise. Significantly, a finding of non-compliance does not trigger the right of self-help; rather, if BellSouth learns conversions were not legitimate, it merely has the right to seek return of lost revenues via a complaint filed with this Commission. *See id.*, Att. 2, § 10.5.4 ("... [if non-compliance is found], BellSouth may file a complaint with the . . . Commission. .").

Section 10.5 (special access conversion and post-conversion audit) with its bargained for exchange by the parties is reflective of the symmetry of obligations and benefits envisioned by the FCC in its *Supplemental Order Clarification*.¹ The parties' voluntarily negotiated symmetrical relationship in their interconnection agreement is an example of what the Telecommunications Act of 1996 sought to achieve in its interconnection provisions. *See* 47 U.S.C. §§ 251, 252.

¹ *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("Supplemental Order Clarification").

This Commission approved the Interconnection Agreement between the parties. That agreement clearly provides that upon 30 days notice, BellSouth may audit NuVox's records. BellSouth submits there is only one proper result here and that is to order that the audit should proceed immediately pursuant to the clear and unambiguous language of the Interconnection Agreement.

ARGUMENT

A. The Clear Contract Language Provides for BellSouth's Audit Rights.

The audit provisions are unambiguous, simple, and clear. NuVox's contentions that the parties had substantially more in mind than what appears in the agreement is a starting point for a long, winding discussion of what NuVox claims the parties intended. Where the language is this clear, further discussion of "intent" is a digression.

1. The Georgia Public Service Commission's NuVox² decision does not "bar BellSouth from prevailing."

NuVox carefully avoided using the term "preclusive" in reference to the effect of the Georgia Public Service Commission's ("GPSC's") decision in the EELs audit complaint case before it. Nevertheless, this Commission must avoid being misled by NuVox's suggestion as to what the Georgia Commission decision means. NuVox repeatedly refers to the GPSC's ruling as part of the "governing Georgia law" on the issue of whether BellSouth must "demonstrate a concern" prior to any audit of NuVox's Kentucky circuits. *See* NuVox Opposition at 2, 3, 6 and 7. NuVox's suggestion, *i.e.*, that this Commission is bound to follow the GPSC's determinations in this matter, is improper. *See id.* at 7, n.22 ("Again, NuVox submits that Georgia law, including the Georgia PSC decisions, *effectively bars* BellSouth from prevailing on this issue")

² *In re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. 12778-U, Order (July 6, 2004).

(emphasis added). This Commission is by no means bound by the GPSC's determinations in this matter.

The Commission's Act-derived authority to approve or reject interconnection agreements, 47 U.S.C. § 252(e), "carries with it the authority to interpret and enforce the provisions of agreements" it approved. *Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 479-80 (5th Cir. 2000). See *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 317 F.3d 1270, 1274 (11th Cir. 2003); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000). By seeking to elevate the GPSC's decision to the law of this case, NuVox erroneously seeks to deprive this Commission's jurisdiction to interpret and enforce interconnection agreements that it approved.

Contrary to NuVox's assertions, this Commission necessarily is afforded the authority under the Act to interpret and enforce provisions of interconnection agreements it has approved. Indeed, as the 11th Circuit recently noted:

A state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved. A [tribunal] might ascribe to the agreement a meaning that differs from what the state commission believed it was approving -- indeed, the agreement as interpreted by the [tribunal] may be one the state commission would never have approved in the first place. **To deprive the state commission of authority to interpret the agreement that it has approved would thus subvert the role that Congress prescribed for state commissions.**

BellSouth Telecommunications, Inc., 317 F.3d at 1278, n.9 (emphasis supplied).

It is inconceivable that the GPSC's interpretive decisions somehow bind this Commission with respect to interconnection agreements this Commission has approved.³ Only this Commission, not the GPSC, had jurisdiction to approve or reject this Interconnection Agreement. Likewise, only this Commission, not the GPSC, has the authority to construe, interpret or enforce this Interconnection Agreement.

2. The Parties Cannot Divest The KPSC Of Its Jurisdiction.

Subject matter jurisdiction is conferred on this Commission by the Act and the parties cannot divest the Commission of its Act-derived jurisdiction. The parties chose Georgia law solely to supply the interpretive tools for the resolution of disputes under the Agreement. By direct implication, if not by express argument, NuVox seeks to enlarge this "housekeeping", choice-of-law principle into the *de facto* vesting in the GPSC of ultimate authority to interpret *all* of the NuVox/BellSouth state-approved agreements regardless of the state of origin. Not only does NuVox's position distort the choice-of-law clause's significance, but the suggestion that necessarily follows, *i.e.*, divestiture of subject matter jurisdiction, is fatally flawed.

It is axiomatic that parties to a contract may not confer subject matter jurisdiction on a tribunal that does not otherwise have it. *See Duncan v. O'Nan*, 451 S.W.2d 626 (Ky. 1970); *see also Sherrer v. Hale*, 285 S.E.2d 714, 717 (Ga. 1982) ("... we agree that the parties cannot by waiver or consent confer equity jurisdiction on a court where it is otherwise without jurisdiction"). The converse of this principle is also true; that is, parties to an agreement may not contractually divest a tribunal of subject matter jurisdiction so vested in it by law. *See*

³ This is precisely the recent finding of the Florida Public Service Commission in the EELs audit enforcement complaint brought by BellSouth in Florida, where NuVox has made similar preclusion contentions before the FPSC. *See In re: Complaint to enforce interconnection agreement with NuVox Communications, Inc. by BellSouth Telecommunications, Inc.*, Docket No. 040527-TP, *Order Denying Motion to Dismiss and Placing Docket in Abeyance* (October 12, 2004) ("*FPSC Order*") (Attached). As the FPSC stated in rejecting NuVox's Motion to Dismiss: "[w]e reject the notion that decisions rendered by a foreign administrative body, regardless of the similarity of issues, are binding or controlling upon this Commission." *FPSC Order* at 2.

Ford v. NYLCare Health Plans, 141 F.3d 243, 248 n.6 (5th Cir. 1998) (“ . . . parties cannot use a choice-of-law provision to divest federal courts of jurisdiction . . .”) (emphasis supplied).

Likewise, the choice of law clause in the Interconnection Agreement should not be construed so as to confer jurisdiction on the GPSC -- or to divest this Commission of its own jurisdiction to interpret and enforce the terms of the Interconnection Agreement. Because adoption of NuVox’s position would yield a forbidden result, this Commission should decline NuVox’s invitation to commit such an error.⁴

B. BellSouth Is Entitled To Summary Disposition.

As outlined in greater detail in BellSouth's Motion, the Agreement's notice, expense and frequency of audit requirements are unambiguous and, thus, must be accorded their plain meaning. Section 10.5.4 does not incorporate any supposed requirements of the *Supplemental Order Clarification*. Notably, Section 10.5.4 defines BellSouth’s audit rights without reference to anything in that *Order*, with the exception of a definitional reference to "local usage options." Agreement, Att. 2, § 10.5.4. The unambiguous language of the Agreement provides BellSouth

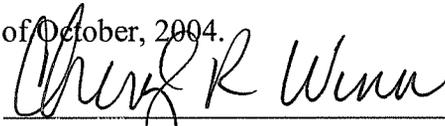
⁴ In its effort to re-write the parties' Agreement, NuVox claims that failure by this Commission to follow the GPSC's contractual interpretation ruling "may well violate the Full Faith and Credit Clause of the U.S. Constitution." NuVox Opposition at 3. In support of its misplaced contention, NuVox cites a single, unpublished district court case from Massachusetts, *Global Naps, Inc. v. Verizon NewEngland Inc.*, 2004 WL 1918706 (D. Mass. 2004). The *Global Naps* case is not germane to the issues in the present matter. NuVox's decision to confine discussion of the case to a parenthetical, three-line footnote is revealing. The factually dense, 30-page opinion does not support NuVox's position. Specifically, the case is distinguishable in three significant ways: (1) the conflict did not involve separate state-approved agreements; (2) the case did not involve any question about the second state commission’s authority to interpret or enforce what it had approved; and (3) the conflict did not involve the interpretation of any contractual language used by the parties. Contrary to any assertion by NuVox, *Global Naps* has no application in the case at hand because the Act’s interpretive and enforcement authority had not been invoked; indeed, such interpretive and enforcement authority only ripens after approval and no prior approval had occurred. Here, this Commission has approved the Interconnection Agreement at issue, thus clearly invoking the Act’s interpretive and enforcement powers. Nothing in *Global Naps* supports any constitutional argument that this Commission must cede its jurisdiction to the GPSC on an Interconnection Agreement reviewed and approved by this Commission.

an *unqualified* right to audit NuVox's circuits provided BellSouth gives 30 days' notice and assumes the audit's expense.⁵ *Id.*

Finally, NuVox disregards the Interconnection Agreement's provisions by prematurely demanding a hearing on the independence of the auditor to be engaged by BellSouth for the audit. NuVox Opposition at 9. The audit clause does not give NuVox any right whatsoever in the matter of selecting the auditor, and certainly not a pre-emptive right. If the audit reveals non-compliance, BellSouth can only then seek recompense through further proceedings, at which NuVox will clearly have the opportunity to raise any questions regarding the auditor's credibility. *See* Agreement, Section 10.5.4.

For the reasons set forth above, as well as the reasons set forth in its Motion for Summary Disposition, BellSouth respectfully requests that the Commission grant its Motion for Summary Disposition.

Respectfully submitted this 20th day of October, 2004.



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⁵ In a case involving precisely the same issues as the matter at bar, the North Carolina Utilities Commission reached the very result that BellSouth seeks here. *See In the Matter of BellSouth Telecommunications, Inc. v. NewSouth Communications, Corp.*, Docket No. P-772, Sub-7, *Order Granting Motion for Summary Disposition and Allowing Audit*, August 24, 2004. In *NewSouth*, the agreement provisions and issues were identical to the provisions and issues in this matter. The NCUC reviewed the same core arguments as in this case. The NCUC rejected NewSouth's contentions in full, and granted summary disposition for BellSouth. *See id.* at 6 ("The cited language is unambiguous and provides BellSouth the right to audit NewSouth's records at BellSouth's expense on thirty days prior notice . . . There are no other restrictions in the Agreement on when BellSouth can initiate and conduct an audit of NewSouth's EELs . . . Because the Agreement clearly addresses the issue of when BellSouth is entitled to conduct an audit, there is no need to look to the [Supplemental Order Clarification] for other possible requirements . . ."). Accordingly, the NCUC ordered NewSouth to permit the audit as requested. *Id.* at 12. In reaching this determination, the NCUC rejected the GPSC's *NuVox* decision and its reasoning, as should this Commission. *Id.* at 8-9, n.3.

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint to enforce interconnection agreement with NuVox Communications, Inc. by BellSouth Telecommunications, Inc.	DOCKET NO. 040527-TP ORDER NO. PSC-04-0998-FOF-TP ISSUED: October 12, 2004
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The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING MOTION TO DISMISS AND PLACING DOCKET IN ABEYANCE

BY THE COMMISSION:

Case Background

On June 4, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed a Complaint to enforce its interconnection agreement with NuVox Communications, Inc. (NuVox). BellSouth asks that the Commission take the appropriate action to enforce the audit provisions in Section 10.5.4 of the agreement with NuVox and order appropriate relief for NuVox's breach of the agreement. On June 24, 2004, NuVox filed a Motion to Dismiss BellSouth's complaint. On July 1, 2004, BellSouth filed its Response to NuVox's Motion to Dismiss.

Motion to Dismiss

I. Standard of Review

In reviewing a motion to dismiss, this Commission takes all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

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Furthermore, a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint to be true. Id. In determining the sufficiency of a complaint, the Commission should limit its consideration to the complaint and the grounds asserted in the motion to dismiss. Flye v. Jeffords, 106 So.2d 229 (Fla. 1st DCA 1958).

II. Analysis and Conclusion

The crux of NuVox's Motion to Dismiss is based upon the doctrines of collateral estoppel and res judicata. NuVox argues that the parties have litigated identical claims and issues before the Georgia Public Service Commission (GPSC). NuVox argues that the GPSC has evaluated these same claims and issues under the identical relevant provisions of the parties' agreement. NuVox concludes from this that the doctrines of collateral estoppel and res judicata should bar BellSouth from bringing this claim before this Commission.

We reject the notion that decisions rendered by a foreign administrative body, regardless of the similarity of issues, are binding or controlling upon this Commission. Thus, NuVox's sole reliance on the doctrines of Collateral Estoppel and Res Judicata fails to demonstrate that BellSouth's Complaint does not state a cause of action upon which relief can be granted. Based on the foregoing, we find it appropriate to deny granting NuVox's Motion to Dismiss.

However, while the Georgia Commission's decision is not binding on this Commission, this matter has undergone substantial litigation. In an effort to avoid a potentially unnecessary burden upon the resources of this Commission and for purposes of administrative efficiency, this Docket shall be held in abeyance for a period of 30 days and the parties are directed to enter Commission staff-assisted discussions to attempt to resolve outstanding issues. If such discussions are unsuccessful, this matter shall be set for hearing.

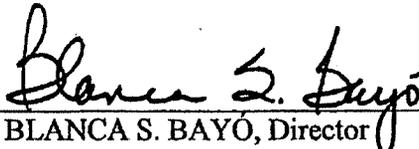
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that NuVox's Motion to Dismiss shall be denied. It is further

ORDERED that this Docket shall be held in abeyance for a period of 30 days and the parties are directed to enter Commission staff-assisted discussions to attempt to resolve outstanding issues.

ORDER NO. PSC-04-0998-FOF-TP
DOCKET NO. 040527-TP
PAGE 3

By ORDER of the Florida Public Service Commission this 12th day of October, 2004.



BLANCA S. BAYO, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

JPR

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof, this 20th day of October 2004.

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